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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 136

AIR TRANSPORT ASSOCIATES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The court of appeals did not render an opinion. The opinions of the Civil Aeronautics Board (R. 29, 38, 68) are not reported.

JURISDICTION

The order of the court of appeals was entered on February 18, 1952 (R. 162). The time within which to file a petition for a writ of certiorari was

extended to and including June 17, 1952, by order of the Chief Justice (R. 165). The petition for a writ of certiorari was filed on June 17, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED

1. Whether a court of appeals may properly dismiss a petition for review of a Civil Aeronautics Board order pertaining to overseas air transportation, which has been approved by the President pursuant to Section 801 of the Civil Aeronautics Act, where the entire record of the Board's proceedings is not before the court.

2. Whether an order of the Board certificating an air carrier for an overseas route pursuant to presidential direction under Section 801 of the Act is judicially reviewable.

3. Whether the failure of petitioner to urge objections to the Board's order before the Board bars judicial review of those objections, or whether reasonable grounds exist which excuse such failure.

4. In the event that the preceding questions are answered in the favor of petitioner, there is the further question presented as to whether, in the circumstances of this case, the Board erred in failing to consolidate petitioner's application for a certificate of public convenience and necessity with its general investigation into the adequacy of air service between the continental United States and Alaska.

STATUTE INVOLVED

The pertinent provisions of the Civil Aeronautics Act, 52 Stat. 973, as amended, 49 U.S.C. 401 *et seq.*, are set forth in the Appendix, *infra*, pp. 14-15.

STATEMENT

Petitioner is a non-certificated irregular air carrier which conducts operations between the continental United States and Alaska (Pet. for Rev., par. 2, R. 2). It seeks review of the dismissal by the court below of its petition for review of orders of the Civil Aeronautics Board certificating two air carriers to serve routes between the continental United States and Alaska.[1]

In March 1948, the Board instituted an investigation into the question of whether the then certificated airlines were providing adequate cargo service between Alaska and the continental United States (Order Serial No. E-1278, R. 38). Subsequently, various applications seeking authority to engage in the transportation of passengers,

[1] Petitioner operates under a Letter of Registration pursuant to a regulation of the Board exempting irregular air carriers holding such letters from the certification requirements of the Civil Aeronautics Act. In proceedings not related to the present case, petitioner's Letter of Registration has been ordered revoked by the Board for violation of the Board's regulations (Order Serial No. E-5723, dated September 21, 1951). This revocation order recently has been affirmed. *Air Transport Associates* v. *Civil Aeronautics Board* (C.A. D.C., Case No. 11260, decided July 10, 1952). Unless the Court should grant a possible petition for a writ of certiorari and thereafter reverse the judgment of the Court of Appeals, the present case presumably will become moot, since petitioner's standing to challenge the Board's present orders rest upon its status as a competitor of the successful applicants.

property and mail were consolidated into the investigation (R. 38).

A prehearing conference was held in May 1948, evidentiary hearings were held before an examiner during the last three months of that year, the examiner's report was filed in December 1949, and in October 1950 the Board submitted to the President a report and proposed order determining that Pacific Northern Airlines should be given a route between Anchorage and Seattle (R. 36). In May 1951, the President instructed the Board to enlarge Pacific Northern's proposed route to include Portland as a terminal, and also to certificate Alaska Airlines to operate a route with Fairbanks, Portland, and Seattle as terminals (R. 30). It is the orders of the Board issued pursuant to this presidential direction (R. 32) which are challenged in the present proceedings.

Petitioner was a party to and participated actively in the proceedings before the Board (*e.g.*, R. 101).[2] Five months after the completion of the hearings before the examiner, petitioner filed an application for a certificate of public convenience and necessity for routes which would be competitive with those involved in the proceedings before the Board (Pet. 5). Petitioner does not assert that it ever requested the consolidation of its ap-

[2] Although petitioner implies that it was prejudiced by the failure of the Board to grant its motion to intervene until after the close of the evidentiary hearings, the record of the Board's proceedings shows that petitioner was apprised at the outset of the hearings that it would be permitted to present an affirmative case as if its motion to intervene had been granted (Tr., p. 99).

plication into the proceedings, and the records of the Board reveal that no such application was filed. Petitioner's brief before the examiner (R. 101-118), which was filed several months after the examiner's report and nearly a year after the filing of petitioner's application for a certificate, failed to make any request that this application be consolidated. And although petitioner requested reopening of the hearings, there was no suggestion that it wished to urge its own application for a certificate at such hearings.[3]

Petitioner filed a petition for review in the court below attacking, on many grounds, the Board's orders herein (R. 1-29). A motion by petitioner for a stay was denied (R. 139). A motion to dismiss or affirm, and a motion for leave to file an abbreviated record, were filed by the Board (R. 137). A motion to dismiss was filed by intervenor Alaska Airlines Inc. (R. 149). After receiving briefs and hearing oral argument, the court below (Miller, Bazelon, and Washington, JJ.) unanimously dismissed the petition for review (R. 162).

[3] Petitioner states that it "has unsuccessfully requested early action" upon its application for a certificate of public convenience and necessity (Pet. 5). This statement is unsupported in the record before this Court. The record of the proceedings before the Board shows that petitioner did not request immediate hearing upon its application until 3 days after the release of the order which is challenged here. Moreover, petitioner made no effort to urge its application at any stage of the proceedings. Thus, at the oral argument before the Board, petitioner's president was asked why it had not filed an application to be heard in the proceeding. Petitioner's president indicated that the company was not, at the time of hearing, interested in obtaining a certificate (Tr., pp. 476, 477). No mention was then made of the application which petitioner had filed after the close of the hearings.

ARGUMENT

1. Petitioner incorrectly urges that the court below erred in dismissing the petition for review without having before it the entire record of the Board's proceedings (Pet. 16-17).

The motion to dismiss the petition for review was rested on jurisdictional grounds.[4] The motion presented a pure question of law—whether a court is empowered to review an order issued at presidential direction and with presidential approval under Section 801 of the Civil Aeronautics Act.[5] It is plain that a motion of this character can be and properly was decided without examination of the complete record of the Board's proceedings, because those proceedings were irrelevant to the determination of the question at issue. All the relevant facts and materials were brought before the court by petitioner in its petition for review of the Board's orders (R. 1-118).

The statutory requirement for the filing with the court of appeals of the record of proceedings

[4] The alternative motion to affirm was not granted by the court and is not at issue here.

[5] Section 801 (52 Stat. 1014, 49 U.S.C. 601) provides in pertinent part:

"The issuance, denial, transfer, amendment, cancelation, suspension, or revocation of, and the terms, conditions, and limitations contained in, any certificate authorizing an air carrier to engage in overseas or foreign air transportation, or air transportation between places in the same Territory or possession, or any permit issuable to any foreign air carrier under section 402, shall be subject to the approval of the President. Copies of all applications in respect of such certificates and permits shall be transmitted to the President by the Board before hearing thereon, and all decisions thereon by the Board shall be submitted to the President before publication thereof."

before the Board is obviously applicable only where the petition for review is heard on the merits. If it is dismissed for want of jurisdiction, the filing of the record becomes superfluous, at least where, as here, the want of jurisdiction appears clearly from the appellant's own papers. This Court has previously held that "the necessity of a record, and the extent thereof, in connection with a motion to dismiss or affirm" filed by an administrative agency in a statutory review proceeding, is a matter resting within the discretion of the court concerned. *American Power Co.* v. *Securities and Exchange Commission,* 325 U.S. 385, 392-3. The discretion to dispense with the record was appropriately exercised here, there is no conflict of decision, and the issue does not merit review by this Court.

2. Petitioner does not in terms ask this Court to review the holding, implicit in the dismissal order of the court below, that there is no judicial review of a Board order issued at the direction of and approved by the President pursuant to Section 801 of the Civil Aeronautics Act. It seems obvious, however, that petitioner's attacks upon the Board's orders cannot be considered unless there can be judicial review of those orders.

In *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.,* 333 U.S. 103, which the petition does not cite, it was held that when the President has acted pursuant to the authority conferred upon him by Section 801 and has approved an order of the Board, such order "emanates from

the President" and "is not susceptible of review by the Judicial Department" (333 U.S. at 112). Since the decision in the *Waterman* case, the courts have declined jurisdiction of cases in which presidentially approved orders of this character were challenged.[6]

Petitioner attacks the President's exercise of authority here upon the ground that the President is not empowered to direct the Board to issue a certificate to a carrier which the Board has not independently found to be qualified (Pet. 7, 18-21). But it was settled in the *Waterman* case, *supra*, that Section 801 confers more than a veto power. The Board's decision on matters subject to presidential approval under Section 801 serves merely "as a recommendation to the President" (333 U.S. at 109). The President controls the ultimate decision. His control "is a positive and detailed control over the Board's decisions, unparalleled in the history of American administrative bodies" (*ibid.*).

This is not the first occasion since the *Waterman* decision that the President has exercised affirmative authority under Section 801 and the courts have declined review. In *Chicago and Southern Air Lines* v. *Civil Aeronautics Board*, a presiden-

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[6] *Alaska Airlines* v. *Civil Aeronautics Board* (C.A. D.C., Case No. 9498), petition for review dismissed for want of jurisdiction, April 22, 1948; *Chicago and Southern Air Lines* v. *Civil Aeronautics Board* (C.A. D.C., Case No. 10375), petition for review dismissed May 8, 1950, certiorari denied, 340 U.S. 829; *Trans World Airlines* v. *Civil Aeronautics Board*, 184 F. 2d 66 (C.A. 2), certiorari denied *sub. nom. Sparks* v. *Civil Aeronautics Board*, 340 U.S. 941.

tial order requiring the Board to certificate a carrier to perform air transportation which the Board had initially determined not to be required by the public interest was unsuccessfully attacked.[7] And in *Trans World Airlines* v. *Civil Aeronautics Board*, an order of the President which directed approval of a transfer of assets and a certificate from one carrier to another withstood challenge.[8] In the light of the terms of Section 801 and the decisions under it, it is clear that petitioner can derive no comfort from the recent steel seizure cases upon which it relies so heavily (Pet. 9-10).[9] Those cases dealt with an exercise of power by the President which was held not to have been conferred by any statute, but to be in the face of a contrary legislative mandate. Here, the President exercised a power specifically conferred upon him by statute, and the exercise of that power has been explicitly held to be judicially unreviewable.

There is likewise no basis for petitioner's further contention that a distinction should be drawn between "foreign" air transportation and "overseas" air transportation with respect to the power

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[7] Petition for review dismissed (C.A. D.C., Case No. 10375), May 8, 1950, certiorari denied, 340 U.S. 829.

[8] 184 F. 2d 66 (C.A. 2), certiorari denied *sub. nom. Sparks* v. *Civil Aeronautics Board*, 340 U.S. 941. The President also designated certain route changes in conjunction with the transfer.

[9] *Youngstown Sheet & Tube Co.* v. *Sawyer*, *Sawyer* v. *Youngstown Sheet & Tube Co.*, Nos. 744, 745, October Term, 1951.

of the President (Pet. 7, 21-22).[10] Section 801 in terms applies to both kinds of transportation, and neither the legislative history adverted to by petitioner nor any other legislative history of which we are aware suggests that the President's power as to one was intended to be greater or less than his power as to the other. Moreover, no such distinction has been suggested in the judicial decisions under the Section.[11]

The decision below is correct on this question, and there is no conflict.

3. Even if it be assumed that the regularity of Board proceedings leading to an order approved by the President under Section 801 might be subject to

---

[10] Section 1 (21) of the Act (49 U.S.C. 401 (21)) defines "overseas air transportation" to include transportation between:

> a place in any State of the United States, or the District of Columbia, and any place in a Territory or possession of the United States; or between a place in a Territory or possession of the United States, and a place in any other Territory or possession of the United States.

"Foreign air transportation" is defined in the same Section to include transportation between:

> a place in the United States and any place outside thereof, whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.

[11] The *Waterman* case involved transportation from continental United States to Puerto Rico via Cuba. The Court concluded "that orders of the Board as to certificates for overseas or foreign air transportation" are not reviewable (333 U.S. at 114). *Chicago & Southern Air Lines* v. *Civil Aeronautics Board* (C.A. D.C., Case No. 10375), certiorari denied, 340 U.S. 829, involved transportation from the continental United States to territories, as well as to foreign countries. And see *Alaska Airlines* v. *Civil Aeronautics Board* (C.A. D.C., Case No. 9489), petition for review dismissed for want of jurisdiction, April 22, 1948.

judicial examination, there is a further obstacle to the consideration of the alleged errors of the Board in the present case, since these purported errors were not properly brought to the Board's attention.

The proceeding for review of the Board's order was brought under Section 1006 of the Act. Subdivision (e) of that Section provides:

> * * * No objection to an order of the Authority [Board] shall be considered by the court unless such objection shall have been urged before the Authority [Board] or, if it was not so urged, unless there were *reasonable grounds* for failure to do so. [Emphasis supplied.]

The purpose of Section 1006 (e) is, of course, to afford the administrative agency an "opportunity to consider on the merits questions to be urged upon review of its order". *Marshall Field & Co.* v. *National Labor Relations Board,* 318 U.S. 253, 256. It has been consistently held that Section 1006 (e) deprives the courts of jurisdiction to consider questions not raised before the Board. *Seaboard & Western Airlines, Inc.* v. *Civil Aeronautics Board,* 183 F. 2d 975 (C.A. D.C.); *New England Air Express* v. *Civil Aeronautics Board,* 194 F. 2d 894 (C.A. D.C.); *Western Airlines, Inc.* v. *Civil Aeronautics Board,* (C.A. 9, Case No. 13245, decided May 19, 1952).

Petitioner's effort to obtain judicial review of the failure of the Board to consolidate its application for a certificate of public convenience and necessity with the Board's general investigation

of service to Alaska (Pet. 17-18) is plainly barred by Section 1006(e). This objection was not urged before the Board; hence, it may not be urged before the courts.

There were no "reasonable grounds" for petitioner's failure to present its objections to the Board. Petitioner had repeated opportunities to request consolidation prior to the issuance of the Board's final order, but never did so. Moreover, petitioner could have filed a petition for reconsideration of that final order. The certificates of public convenience and necessity issued by the Board to Alaska Airlines and Pacific Northern Airlines were expressly made subject to the power of the Board to entertain petitions for reconsideration (R. 34, 35). And the Board's rules of practice (14 C.F.R. (Supp. to 1949 ed.) Sec. 302.11) provided that any party might petition for reconsideration of any final order of the Board.[12]

4. If it be assumed, *arguendo,* that petitioner has standing to attack the Board's failure to consolidate its application, the attack must nevertheless fail on the merits. It is true, of course, that opportunity must be granted for hearing mutually exclusive applications before either one is decided. *Ashbacker Radio Corporation* v. *Federal Communications Commission,* 326 U.S. 327. But this prin-

[12] In the past, the Board has upon reconsideration reversed, with the approval of the President, an order which it had previously entered with his approval. *Pacific Northwest-Hawaii Service Case,* 9 C.A.B. 414, approved July 29, 1948; *Pacific Northwest-Hawaii Service Case,* 9 C.A.B. 580, approved October 2, 1948.

ciple is obviously applicable only to applications which are pending at the time a mutually exclusive application is processed, and is certainly inapplicable where a late-filing applicant has previously participated actively in an area proceeding. *Civil Aeronautics Board* v. *State Airlines, Inc.*, 338 U.S. 572.[13] Therefore, even if it be assumed that the applications here were mutually exclusive, petitioner cannot be heard to complain of a failure of the Board to reopen the hearings to include an application filed some months after the hearings closed.[14]

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[13] *Northwest Airlines* v. *Civil Aeronautics Board*, 194 F. 2d 339 (C.A. D.C.), upon which petitioner relies, is plainly distinguishable from the case at bar. In the *Northwest* case, the petitioner's application was pending during the entire course of the proceeding as to which it was contended that there should have been consolidation. Moreover, there was a request by Northwest for consolidation which was held by the court to be timely under the particular circumstances of the case.

[14] *Ward* v. *Federal Communications Commission*, 108 F. 2d 486 (C.A. D.C.); *Pittsburgh Radio Supply House* v. *Federal Communications Commission*, 98 F. 2d 303 (C.A. D.C.); *Red River Broadcasting Company* v. *Federal Communications Commission*, 98 F. 2d 282 (C.A. D.C.), certiorari denied, 305 U.S. 625.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1952.

APPENDIX

Section 801 of the Civil Aeronautics Act (52 Stat. 1014, 49 U.S.C. 601) provides in part:

> The issuance, denial, transfer, amendment, cancelation, suspension, or revocation of, and the terms, conditions, and limitations contained in, any certificate authorizing an air carrier to engage in overseas or foreign air transportation, or air transportation between places in the same Territory or possession, or any permit issuable to any foreign air carrier under section 402, shall be subject to the approval of the President. Copies of all applications in respect of such certificates and permits shall be transmitted to the President by the Authority [Board] before hearing thereon, and all decisions thereon by the Authority [Board] shall be submitted to the President before publication thereof. * * *

Section 1006 of the Act (52 Stat. 1024, 49 U.S.C. 646) provides in part:

> (a) Any order, affirmative or negative, issued by the Authority [Board] under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the circuit courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such or-

der. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

* * * * *

(e) The findings of facts by the Authority [Board], if supported by substantial evidence, shall be conclusive. No objection to an order of the Authority [Board] shall be considered by the court unless such objection shall have been urged before the Authority [Board] or, if it was not so urged, unless there were reasonable grounds for failure to do so.

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IN THE

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October Term, 1952

No. 136

AIR TRANSPORT ASSOCIATES, *Petitioner*

v.

CIVIL AERONAUTICS BOARD, *Respondent*
ALASKA AIRLINES, INC., *Intervener*
PACIFIC NORTHERN AIRLINES, INC., *Intervener*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

BRIEF OF INTERVENOR ALASKA AIRLINES, INC. IN OPPOSITION.

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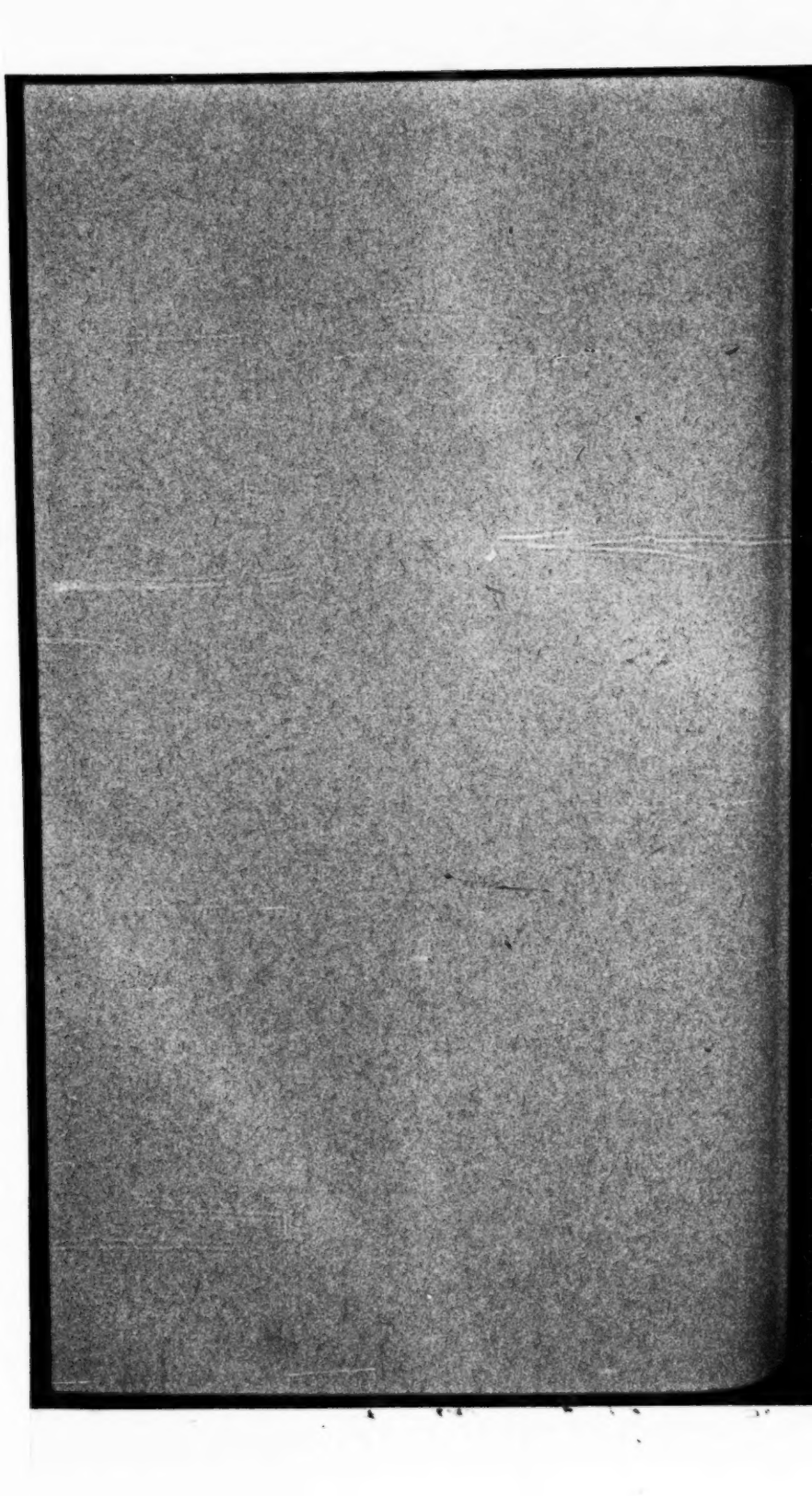

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IN THE

Supreme Court of the United States

October Term, 1952

No. 136

AIR TRANSPORT ASSOCIATES, *Petitioner*

v.

CIVIL AERONAUTICS BOARD, *Respondent*
ALASKA AIRLINES, INC., *Intervener*
PACIFIC NORTHERN AIRLINES, INC., *Intervener*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

BRIEF OF INTERVENOR ALASKA AIRLINES, INC. IN OPPOSITION.

OPINIONS BELOW.

The per curiam order of the United States Court of Appeals for the District of Columbia Circuit (R. 162) dismissing the Petition for Review of the order of the Civil Aeronautics Board (R. 29-32) has not yet been reported.

JURISDICTION.

The grounds upon which jurisdiction of this Court is invoked are set out in the Petition for Writ of Certiorari at page 2.

QUESTIONS PRESENTED.

1. Whether the holding of this Court in *Chicago and Southern Air Lines* v. *Waterman Steamship Corporation*, 333 U. S. 103 (1948) precludes judicial review of the order involved in this proceeding, which completely emanated from the President in that it only reflected a directive of the President contrary to the recommendation of the Board.

2. Whether a Court of Appeals may pass upon a Motion to Dismiss a Petition for Review of an order of the Civil Aeronautics Board for lack of jurisdiction without having before it a transcript of the entire record of the preceedings before the Board when the Petition for Review and five lengthy exhibits attached thereto contained all of the material pertinent to the issue raised by the Motion to Dismiss.

3. Whether, if over one year after the institution of a proceeding before the Civil Aeronautics Board to consider application for certificates of public convenience and necessity authorizing air transportation between the United States and Alaska, and after the close of the hearings therein, an additional application seeking such certificate is filed by one of the interveners which had participated in the proceeding, the Board is required to hear and pass upon such additional application prior to, or simultaneously with, the pending proceeding, particularly when such application cannot be considered mutually exclusive with those involved.

4. Whether judicial review of the objections to the Order of the Board which Petitioner now raises is precluded by the fact that they were not raised before the Board at any time as required by Section 1006(e) of the Civil Aeronautics Act, 49 U. S. C. 646(e), although there was ample oppor-

tunity to do so in the form of a Petition for Reconsideration to the Board as authorized by its Rules of Practice.

STATUTE AND RULE INVOLVED.

The pertinent statutory provisions are cited in Appendix A of the Petition for Writ of Certiorari. The pertinent Rules of Practice of the Civil Aeronautics Board are set out in Appendix A, *infra*, page 19.

STATEMENT.

The order which Petitioner seeks to set aside was issued in a proceeding which commenced on March 9, 1948, when the Civil Aeronautics Board on its own initiative issued an order instituting a proceeding to inquire into the matter of the adequacy of the air cargo services of the certificated carriers between Alaska and the continental United States. (R. 38). The following month the Board expanded the proceeding to embrace applications which sought certificates of public convenience and necessity for the carriage of persons, property, and mail between the same geographical areas including, *inter alia*, an application of Alaska Airlines and Pacific Northern Airlines for certificates between the United States and Alaska. (R. 38).

On May 9, 1949, after the hearings had been completed and briefs had been submitted to the Examiner, Petitioner filed an application for a certificate of public convenience and necessity between the United States and Alaska. It never sought consolidation of this application in the pending proceeding and contended for the first time with the Court below that its application should have been considered prior to, or simultaneously with, those in the pending proceeding.

Section 801 of the Civil Aeronautics Act, 49 U. S. C. 601, provides that the "issuance" or the "denial" of any certificate "authorizing an air carrier to engage in overseas or foreign air transportation . . . shall be subject to the approval of the President." Pursuant to this section of

the Act, the Board submitted a recommendation to the President that Pacific Northern Airlines should be awarded a certificate between the United States and Alaska and that all other applications including that of Alaska Airline should be denied. As stated in the Order for which review is sought herein (R. 30):

> "On May 18, 1951, the President advised the Board that after taking into account all of the considerations and factors relating to this matter peculiarly within the scope of the Executive, particularly the need for air transport services to Alaska arising directly out of national defense activities, and the direct contribution which the fullest development of Alaska would make to the national defense, he had concluded that the Board's decision should be approved with the following changes:
>
> 1. Pacific Northern Airlines, Inc. should be authorized to serve Portland, Oregon, as a coterminal point with Seattle, Washington; and
>
> 2. Alaska Airlines should be granted a route from the coterminal point, Seattle, Washington, and Portland, Oregon, to Fairbanks, Alaska, carrying passengers, property and mail."

Acting pursuant to this Presidential directive under Section 801 of the Act, the Board on May 24, 1951, entered its supplemental opinion and order (R. 29-32) and submitted it to the President who approved of it on May 25, 1951. It is this order carrying into effect a decision of the President which Petitioner seeks this Court to review.

By the terms thereof, the certificate granted to Alaska Airlines was to become effective sixty days after the date of its approval by the President (as in fact it did) unless such effective date was extended by order of the Board prior to such date either on the Board's own initiative or upon the filing of a petition for reconsideration of the Board's order of May 24, 1951. (R. 35). (Petitions for reconsideration are authorized by the Board's Rules of Practice as set out in Appendix A, *infra*.) Although such

petitions were filed by several of the other parties, the Petitioner herein failed to file any petition with the Board for reconsideration of the order complained of herein; and it did not at any time ask the Board to extend the effective date of the certificate or to consider the objection that the President had exceeded his statutory authority—a contention which has never been presented to the Board.

On July 23, 1951, Petitioner filed its Petition for Review with the United States Court of Appeals for the District of Columbia Circuit. (R. 1). On August 1, 1951, the Respondent, Civil Aeronautics Board, filed a motion with the Court, which, *inter alia*, requested the Court to dismiss the Petition for Review for want of jurisdiction on the grounds that an order of the Board approved by the President is not subject to judicial review in accordance with the decision of this Court in *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U. S. 103 (1948) (R. 137, 143). On the same date, the Respondent filed a motion with the Court for the entry of an order authorizing the Board to file an abbreviated transcript of the record for consideration in passing upon the above-mentioned motion. (R. 137). On August 24, 1951, the Intervenor, Alaska Airlines, Inc., filed a motion with the Court requesting it to dismiss the Petition for Review in its entirety for want of jurisdiction in accordance with the *Waterman Case*, or, in the alternative, for failure to allege errors subject to judicial review. (R. 149, 150). On February 18, 1952, the Court issued an order which recited that the Petition for Review had come before the Court "for hearing on Respondent's Motion to Dismiss or Affirm Forthwith, on the Motion of Alaska Airlines, Inc., Intervenor, to Dismiss, and on the Respondent's Motion for Leave to File an abbreviated transcript of record," and ordered that the Petition for Review be dismissed. (R. 162).

Although eighteen points of error were alleged in the Petition for Review of the order of the Civil Aeronautics Board (R. 7-10), the Petitioner, as indicated by its "Questions Presented," set forth in its Petition at pages 3 and 4,

has apparently elected to rely upon only two of them: That the Board should have considered Petitioner's application for a certificate of public convenience and necessity prior to, or simultaneously with, its decision in the proceeding before the Board, and that the President exceeded his statutory authority in directing the issuance of a certificate to Alaska Airlines. To these two alleged errors of the Civil Aeronautics Board, Petitioner has added an alleged error of the Court below in passing upon the motions to dismiss the Petition for Review without having available for inspection the entire record of the proceeding before the Board. (Petition, page 3).

ARGUMENT.

1. The President's Authority to Approve an Order of the Board Granting a Certificate for Overseas and Foreign Air Transportation was Exhaustively Considered by This Court in Chicago & Southern Air Lines v. Waterman Steamship Corporation, 333 U. S. 103 (1948). The Court of Appeals for the District of Columbia Circuit was Clearly Correct in Dismissing the Petition for Review Because the Waterman Case Precludes Judicial Review of an Order of the Board Approved by the President, Carrying Into Effect a Decision Made by Him.

It is somewhat surprising to find no mention whatsoever of the *Waterman Case* in the Petition for Writ of Certiorari when it was the primary ground upon which Respondent and Intervenor have sought dismissal of the Petition for Review. (R. 143, 150).

Petitioner presented to the Court below for review an order of the Board which is not only squarely within the holding of this Court in the *Waterman Case*, but represents an even stronger factual situation than was there presented. The *Waterman Case* held that an order of the Board subsequently approved by the President was not reviewable

since "whatever of the order emanated from the President is not susceptible to review by the judicial department." *Idem* 112. The order in that case coincided with a recommendation of the Board that Chicago & Southern Air Lines be certificated for a route in the Latin American Area. In the present case, however, the President disapproved of the recommendation of the Board, that the application of Alaska Airlines be denied and directed that a certificate be issued to it. The order which Petitioner complains of herein, therefore, *completely* "emanates from the President" since it reflects purely and simply the directive of the President which was contrary to the recommendation of the Board and is unquestionably within the scope of the *Waterman Case* holding such orders to be nonreviewable by the judicial department.[1]

Prior to considering the distinction which the Petitioner attempts to make between the facts in the instant case and the *Waterman* decision, it is necessary to correct Petitioner's consistent implication throughout its Petition for Writ of Certiorari to the effect that the Board found that Alaska Airlines "did not meet the standards prescribed by Congress as a prerequisite" to the issuance of a certificate. (Petition, pages 2, 4, 14, 21). In its original opinion submitted to the President as a recommendation, the Board found that the public convenience and necessity required the addition of another carrier between Seattle and Anchorage, Alaska, and then turned to a consideration of which carrier applicant should be awarded the certificate.

[1] All petitions for review of orders of the Board approved by the President carrying into effect a decision made by him filed since the *Waterman Case* have been dismissed on the basis thereof, even though, in each instance, the Petitioners strained to find distinctions. *Trans World Airlines, Inc.* v. *Civil Aeronautics Board*, et al., 184 F. 2d 66 (C.C.A. 2nd 1950), Cert. denied *sub. nom. Sparks* v. *Civil Aeronautics Board*, 340 U. S. 941 (1951); *Chicago & Southern Air Lines, Inc.* v. *Civil Aeronautics Board*, App. D.C. No. 10,375 (January 18, 1950); Petit. for Rehearing Denied (May 8, 1950); Cert. denied, 340 U. S. 829 (1950); Pet. for Rehearing Denied, 340 U. S. 885 (1950).

The Board did *not* find Alaska Airlines "unfit" in this proceeding to conduct this operation, however, as it did, for example in the case of another applicant, Mt. McKinley Airlines. (R. 53). All that the Board did was to consider the *relative* fitness of the Intervenor and the diversionary effect from a traffic standpoint of the authorization of the one carrier as opposed to the other, and recommended that Pacific Northern Airlines be authorized to operate the route between Seattle and Anchorage. It did *not* make any finding of the ultimate fitness or unfitness of Alaska Airlines to conduct air transportation between Seattle/Portland and Fairbanks, Alaska, which is the route the President directed the Board to award to Intervenor for reasons of national policy. In view of this fact, the only remaining contention contained in Petitioner's third "Question Presented" (Petition, page 4) is that the President designated the Intervenor to conduct the air transportation above described without the benefit of an ultimate finding by the Board as to its "fitness, willingness and ability."

This objection of the Petitioner that the President acted without a finding of "fitness" is squarely within the factual situation involved in the *Waterman Case* itself. One of the contentions raised on review there was that the Board had submitted a legally defective finding to the President of the fitness of the carrier which it recommended to the President for certification since the finding was not supported by substantial evidence. *Idem*, 117. This contention may or may not have been true, for this court never considered it on the merits and dismissed the charge with the holding that it did not have jurisdiction to consider the Petition for Review. If this Court in the *Waterman Case* decided that it did not have jurisdiction to review what might have been an inadequate, indeed, a possibly mistaken recommendation wrongly influencing the President's determination, it is impossible to see how Petitioner can now argue that jurisdiction exists to consider whether the lack of any recommendation at all on this point constituted defective procedure.

Of even more importance, however, is the fact that Petitioner's objection is fully within the scope of the two principles which the Supreme Court applied in the *Waterman Case* in considering the reviewability by the judicial department of an order of the Board approved by the President. This Court there determined that such orders embodied Presidential discretion as to matters beyond the competence of the courts to adjudicate, *Idem*, 114, and that to review such orders would be to render "an advisory opinion in its most obnoxious form." *Idem*, 113. The exhaustive treatment given these matters in the opinion should set at rest any contention that a factual variation such as Petitioner alleges in this case destroys the applicability of the *Waterman* doctrine.

In the *Waterman Case* this Court first analyzed the nature of air transportation required by Section 801 of the Civil Aeronautics Act to be approved by the President and recognized that aerial navigation routes and bases should be prudently correlated with facilities and plants for our national defense. *Idem*, 108. It concluded, therefore, that pursuant to this recognition Congress had provided for Presidential control which "is not limited to a negative but is a positive and detailed control over the Board's decisions, unparalleled in the history of American administrative bodies," *Idem*, 109, and was a type of control which has "long been held to belong in the domain of political power and not subject to judicial intrusion or inquiry." *Idem*, 111.

In the present case, the Board, in its explanatory opinion accompanying its order of May 24, 1951, stated that after it submitted to the President its decision in which it decided the application of Alaska Airlines should be denied, the President "advised the Board that after taking into account all of the considerations and factors relating to this matter peculiarly within the scope of the Executive, particularly the need for air transport services to Alaska arising directly out of national defense activities, and the direct contribution which the fullest development of Alaska would

make to national defense, he had concluded that the Board's decision should be approved" with the change that Alaska Airlines should be granted a route from Seattle/Portland to Fairbanks, Alaska. (R. 30). The Board reflected this directive of the President in an order subsequently approved by the President. This order granting a certificate to Alaska Airlines over which Petitioner now seeks judicial review, is therefore, based solely upon the President's judgment and fully falls within the recognition by this Court in the *Waterman Case* that the "judiciary has neither aptitude, facilities, nor responsibility" to handle such questions. *Idem*, 111.

This Court also applied the principle in the *Waterman Case* that the judicial department will not exercise jurisdiction over matters where it cannot with finality decide the issues present. On page 113 of its opinion, this Court said: "To revise or review an administrative decision which has only the force of a recommendation to the President would be to render an advisory opinion in its most obnoxious form—advice that the President has not asked, tendered at the demand of a private litigate, on a subject concededly within the President's exclusive ultimate control."

Assume that judicial review is taken in this case and Petitioner's contentions expressed in its Petition for Review are sustained. The Court below would remand the matter to the Board for further proceedings in accordance with its opinion, but anything which the Board did pursuant thereto would be subject to later Presidential approval, which this Court in the *Waterman Case* described as a "positive and detailed" control of the Board's action. The President therefore has the ultimate discretion to disregard any decision of the Court. Such a situation clearly falls within the scope of the *Waterman Case*, where this Court forcefully pointed out at page 113 of the opinion that "judgments within the powers vested in courts by the judiciary article of the Constitution may not lawfully be revised, overturned or refused faith and credit by another department of the Government" and "if the President may

completely disregard the judgment of the court, it would only be because it is one the courts were not authorized to render." It is submitted, therefore, that the Court below is completely correct in its interpretation of the *Waterman Case* to cover the instant case. The contentions which Petitioner now raises do not present a distinguishing factual situation raising any important new issues which have not already been fully covered by the extensive treatment of this entire question in the *Waterman Case.*

Brief mention might be made of two other arguments which Petitioner seeks to use to distinguish this proceeding from the *Waterman Case.*

First of all, Petitioner appears to argue that the President's power in connection with "overseas air transportation" is more limited than it is in the case of "foreign air transportation". It then notes that this proceeding involves just "overseas air transportation" whereas the *Waterman Case* involved "foreign air transportation". Presidential approval, however, is required pursuant to Section 801 of the Civil Aeronautics Act for the issuance of certificates authorizing either *overseas or foreign air transportation*— whether the Petitioner considers this statutory language "unfortunate" or not. (R. 20). Indeed, it is clear from the concluding paragraph of the Court's opinion in the *Waterman Case* that this Court had no doubt that Presidential approval applied to overseas as well as foreign air transportation.

> "We conclude that orders of the Board as to certificates for *overseas* or foreign air transportation are not mature and therefore not susceptible to judicial review at any time before they are finalized by Presidential review. After such approval has been given, the final orders embody Presidential discretion as to political matters beyond the competence of the courts to adjudicate." 333 U. S. 103, 114 (Italics supplied).

Moreover, the dissenting opinion specifically makes it clear that the holding of the majority applies to overseas air

transportation as, for example, between "Seattle and Juneau, Alaska." 333 U. S. 103, 117.[2]

Secondly, Petitioner seeks to find some support in the recent "*steel*" cases and alleges that they "probably" conflict with the decision of the Court below. *Youngstown Sheet and Tube Company, et al.* v. *Sawyer* and *Sawyer* v. *Youngstown Sheet and Tube Company, et al.*, 72 Sup. Ct. 863 (decided June 2, 1952). These cases are *completely* distinguishable in that there is no claim made herein that the President acted solely pursuant to any "inherent power". The President's action taken herein was pursuant to Section 801 of the Civil Aeronautics Act, which, as this Court pointed out in the *Waterman Case*, provides a "positive and detailed control over the Board's decisions, unparalleled in the history of American administrative bodies." *Idem* 109. Indeed, as Mr. Justice Jackson pointed out in his concurring opinion in the "*steel*" cases at 72 S. Ct. 863, 871: "When the President acts pursuant to an express or implied authorization of Congress, his authority is at a maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." Mr. Justice Jackson then cited the *Waterman Case* as an example of such "a wide definition of Presidential powers under statutory authorization." Intervenor submits that there is no inconsistency whatsoever between the "*steel*" cases and the decision of the Court below in this proceeding.

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[2] In the *Chicago & Southern Air Lines Case*, note 1, *supra*, the Court of Appeals for the District of Columbia Circuit dismissed on the basis of the *Waterman Case* a Petition for Review (and this Court twice denied certiorari) of an order of the Board approved by the President involving a certificate embracing both overseas and foreign air transportation. Furthermore, Petitioner there unsuccessfully made the same argument as the Petitioner here repeats that the President did not have authority to designate a carrier to render air transportation without the benefit of a finding of its "fitness, willingness, and ability" by the Board.

2. The Court of Appeals for the District of Columbia Circuit was Correct in Passing Upon the Motions to Dismiss the Petition for Review for Lack of Jurisdiction Without Having Before it the Entire Record of the Proceeding Before the Civil Aeronautics Board in Accordance with the Decision of This Court in American Power Co. v. Securities and Exchange Commission, 325 U. S. 385 (1945).

Section 1006(c) of the Civil Aeronautics Act, 49 U.S.C. 646(c) requires the Board to certify and file in the court a transcript of the record upon which the order complained of was entered. This Court has held, however, in connection with identical language in Section 24(a) of the Public Utility Holding Co. Act, 15 U. S. C. 79x(a), that "the necessity of a record, and the extent thereof, in connection with a motion to dismiss or affirm" filed by an administrative agency in a statutory review proceeding is a matter resting within the discretion of the Court concerned. *American Power Co.* v. *Securities and Exchange Commission*, 325 U. S. 385, 392, 393 (1945). Thus in *Okin* v. *Securities and Exchange Commission*, 143 F. 2d 943 (C. C. A. 2nd 1944) the Court there held that it could grant a motion to dismiss for lack of jurisdiction on the basis of the pleadings filed and without any of the record of the proceeding before the Securities and Exchange Commission being certified. In *Chicago & Southern Air Lines* v. *Waterman Steamship Corporation*, both the Court below, 159 F. 2nd 828 (C. C. A. 5th 1947), and this Court, 333 U. S. 103 (1948) considered upon a skeleton record a motion to dismiss a Petition for Review of an order of the Civil Aeronautics Board approved by the President on the grounds of a lack of jurisdiction. In the *Waterman Case*, incidentally, the Petitioner there, as did Petitioner below, alleged a lack of substantial evidence to support findings. 333 U. S. 103, 117.

Both the Respondent and the Intervenor filed Motions to Dismiss the Petition for Review with the Court below on

the grounds that the Court did not have jurisdiction to review the order of the Board approved by the President granting the Intervenor a certificate of public convenience and necessity on the authority of this Court's decision in the *Waterman Case.* (R. 137, 143, 150). The Court below, in dismissing the Petition for Review, apparently did not even require the "abbreviated record" which the Respondent lodged with the Clerk since it never authorized the filing thereof. (R. 162). The material contained in the Petition for Review itself (including five lengthy appendices attached thereto (R. 29-118A) contained sufficient information upon which the Court could act for purposes of dismissal.

Accordingly, Intervenor submits that the question presented by Petitioner has been decisively considered in the *American Power Co.* and *Waterman Cases* and does not require review by this Court.

3. The Doctrine of Ashbacker Radio Corporation v. Federal Communications Commission, 326 U. S. 327 (1945) Does not Require the Civil Aeronautics Board to Hear and Pass Upon an Application Filed Over One Year After the Institution of a Pending Proceeding in Which Similar Applications are Being Considered, and After the Close of the Record Therein, Prior to, or Simultaneously With, the Decision in Said Proceeding, Particularly When the Application is Not Mutually Exculsive With Those Being Considered.

Petitioner's application for a certificate of public convenience and necessity was filed on May 9, 1949—over one year after the over-all proceeding in which the Board was considering applications for the U. S.-Alaska service had been instituted and after briefs had been filed with the Examiner. It could have filed this application as early as a year before, in May of 1948, when it was incorporated and the Board had just issued orders outlining the scope of the U. S.-Alaska proceeding. (R. 2, 3).

Petitioner is now contending for a truly startling interpretation of the *Ashbacker Case* which held that two mutually exclusive applications for a radio construction permit from the F.C.C., neither of which had been acted upon, must both be considered prior to the grant of either application. Petitioner urges that case as having required the Board to consider its application prior to, or simultaneously with, a pending proceeding which had already advanced beyond the stage of hearings and briefs to the Examiner! Were the *Ashbacker Case* to go so far, of course, it would wrought complete havoc in all administrative proceedings. All that a party need do in order to delay the disposition of any pending proceeding would be to wait until after hearings had been completed and briefs filed with the Examiner (as here), file an application which it contends is "mutually exclusive", and then require the administrative agency to hear its particular application before rendering a decision in the pending proceeding!

Furthermore, Petitioner has alleged without any support whatsoever in its Petition for a Writ of Certiorari that the application which it had on file with the Board was "mutually exclusive" and, therefore, under the doctrine of the *Ashbacker Case,* should have been considered prior to, or simultaneously with, the pending proceeding. Apparently Petitioner is of the opinion that any application involving a request for a certificate of public convenience and necessity from the Board authorizing air transportation between the same points in another application presently being considered by the Board is, automatically, "mutually exclusive" therewith. This is not true at all and does not even approach the situation in the *Ashbacker Case* where it was apparent that there was only room for one radio station because two stations would cause "intolerable interference" with each other. 326 U.S. 327, 331. Thus, if there may be room for ten air carriers, for example, between the United States and Alaska and there is one application presently being processed by the Board, another

applicant cannot allege that his application must be considered prior to or simultaneously with the pending application simply because it involves service between the same pair of points.

The Board has never indicated anywhere that there is a permanent "limit" to the number of air carriers who will be authorized to conduct air transportation between the United States and Alaska. In 1946 in the *Pacific Case*, 7 C.A.B. 209, the Board certificated Northwest Airlines between the United States and Alaska in addition to the already existing carrier, Pan American Airways, but stated that "an additional carrier can be authorized at any time and the Board can and will act promptly if the existing services prove inadequate." (R. 41). In the interim between the *Pacific Case* and this proceeding, the Board issued "exemption" orders authorizing additional carriers to conduct air transportation between the United States and Alaska. (R. 42). In the proceeding below the Board added two more certificated carriers between the United States and Alaska—Pacific Northern Airlines and Alaska Airlines. (R. 33, 34). But this does not mean that Petitioner is forever excluded from receiving a certificate authorization. Indeed, it, along with some 20 other applicants, are seeking limited certificate authorization between the United States and Alaska right now from the Board in a proceeding entitled the *"Investigation of Services by Large Irregular Carriers and Irregular Transport Carriers,"* Docket No. 5132. Furthermore, as the Board recited in the order of the Board (R. 31), the President expressed his desire to have the problem of the extent and the character of U. S.-Alaska air services carefully reviewed prior to 1953 when the existing temporary certificates of Northwest Airlines, Pacific Northern Airlines, and Alaska Airlines expire and "to initiate and carry forward to completion as promptly as possible a study to develop a proposed plan for the continuation of air transport services for Alaska of the character and extent needed to meet the requirements of Alaska and of the national interest." In such

a proceeding Petitioner can then argue that it, too, should be certificated or that it should be certificated in place of one of the existing carriers whose authorization is up for renewal.

Intervenor submits, therefore, that Petitioner's demand that its application for a certificate between the U. S. and Alaska, filed one year after the institution of a proceeding before the Board and after hearings have been completed and briefs submitted to the Examiner, where there has been no declaration as to the limit of the number of U. S.-Alaska carriers, is such a far cry from the physical exclusivity existing between the applications in the *Ashbacker Case*, as not to raise an issue requiring review of this Court.

4. Judicial Review of the Contention Which Petitioner Now Raises as to the Extent of the President's Authority Pursuant to Section 801 of the Civil Aeronautics Act is Precluded by the Fact That it Was Never Raised Before the Board at any Time as Specifically Required by Section 1006(e) of the Civil Aeronautics Act.

Section 1006(e) of the Civil Aeronautics Act which is set forth in full on page 36 of the Petition for Writ of Certiorari, provides in part:

> "No objection to an order of the (Board) shall be considered by the Court unless such objection shall have been urged before the (Board) or, if it was not so urged, unless there were reasonable grounds for failure to do so."

This Court has declared that compliance with the provision of this type in statutes dealing with judicial review of administrative action is a prerequisite to judicial review. *Marshall Field & Co.* v. *National Labor Relations Board*, 318 U.S. 253, 256 (1943).

Petitioner is now seeking review of the order of the Board on the grounds, *inter alia*, that the President exceeded his statutory authority under Section 801 of the

Act. Although this contention could not have been made prior to the issuance of the final order of the Board which represented final action of both the President and the Board, Petitioner had ample opportunity thereafter to do so in the form of a Petition for Reconsideration of the order as specifically provided for in the Board's regulations. (See Appendix A). Petitioner did not file any Petition for Reconsideration and is therefore presenting this contention to the Court below for the first time in patent contravention of the provisions of Section 1006(e) cited above.

CONCLUSION.

WHEREFORE, for the reasons stated above, Intervenor, Alaska Airlines, prays that this Honorable Court deny the Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia, filed by the Petitioner, Air Transport Associates, Inc.

Respectfully submitted,

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Dated: July 18, 1952

APPENDIX A.

Section 302.11 of the Civil Aeronautics Board's Rules of Practice in Economic Proceedings, 14 C.F.R. 302.11 [1]

Petition for rehearing, reargument, or reconsideration—(a) *Parties.* Any party may petition for rehearing, reargument, or reconsideration of any final order by the Board in a proceeding, or for further hearing before decision by the Board.

(b) *Contents of petitions.* (1) The matters of record claimed to have been erroneously decided must be specified, and the alleged errors, and the grounds relied upon must be briefly and specifically stated in the petition.

(2) If a final order of the Board is sought to be vacated or modified by reason of matters which have arisen since the hearing, or of a consequence which would result from a compliance therewith, or both, the new matter, the resulting consequence, or both, which are relied upon by the petitioner must each be set forth in the petition. Where the petition is based wholly or in part upon new matter, the petition must contain a statement that the petitioner, with due diligence, could not have known or discovered the new matter prior to the time of the hearing.

(3) The petition must set forth a brief statement of the relief sought by the petitioner and conform to requirements of § 285.3.

(c) *Filing and service of petitions.* Such petition for rehearing, reargument, or reconsideration, must be filed within thirty days after service of the order sought to be vacated or modified. After the expiration of said thirty days, such a petition may be filed only by leave of the Board granted pursuant to formal application upon a showing of reasonable grounds for failure to file the petition within the

[1] Effective April 28, 1952 this Section was substantially revised but retained the provision for filing Petitions for Reconsideration 30 days after service of the order sought to be vacated or modified. 14 C. F. R. 302.37.

prescribed thirty-day period. Any such petition or application shall be served by the petitioner or applicant upon all parties to the proceeding or their attorneys of record.

(d) *Stay of orders.* No petition for rehearing, reargument, or reconsideration filed in accordance with this section, or the granting thereof, shall operate as a stay of the effective date of the final order sought to be modified or vacated by such petition, unless specifically so ordered by the Board.

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